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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of CONSTANCE MELANI and PAUL SWENSON.	
CONSTANCE MELANI, Appellant, v. PAUL SWENSON, Respondent.	A140485 (Contra Costa County Super. Ct. No. MSD1100768)

Appellant Constance Melani and respondent Paul Swenson dispute the proper interpretation of a provision in a postnuptial agreement (the agreement) governing reimbursement of their separate property contributions to their marital residence, which had declined in value since the couple purchased it. The agreement provided that if the equity in the residence was insufficient to reimburse the parties for their separate property contributions to its acquisition, the deficiency would be shared equally between them. The family court concluded that reimbursement for the deficiency was limited to the parties' equity in the house. Melani contends the family court erred, and her entitlement to reimbursement is not so limited. We agree with Melani, and shall reverse the judgment to the extent it denies her claim for reimbursement.

I. BACKGROUND

Melani and Swenson began their relationship in 2004, began living together in September 2006, and married in January 2007. They bought a house on Derby Drive in San Ramon (the Derby house) in September 2006, for $1,168,000. They paid the down payment of $250,000 using a line of credit on Swenson's separate property residence in Danville (the Danville house) and obtained a home loan for the remainder of the purchase price. After they bought the house, Melani gave Swenson $250,000 of her separate property funds to pay off the line of credit on the Danville house. She used an additional $750,000 of her separate property to improve the Derby house and reduce the principal balance of the home loan, and Swenson used $50,000 of his separate property to improve the Derby house.[1] The loan balance on the Derby house was $417,000.

Melani and Swenson entered into the agreement in August 2008. They agreed that the Derby house was community property. The agreement provided that Melani's "separate property interest in the Derby Drive residence shall consist of a right of reimbursement equal to $1,000,000, plus the amount of [Melani's] separate property 'contributions to the acquisition of the residence' from the date of this Agreement forward, plus [Melani's] 'share of the appreciation of the residence' from the date of this Agreement forward." Swenson's separate property interest consisted of "a right of reimbursement equal to $50,000, plus the amount of [Swenson's] separate property 'contributions to the acquisition of the residence' from the date of this Agreement forward plus [Swenson's] 'share of the appreciation of the residence' from the date of this Agreement forward."

The agreement also provided for separate property reimbursement in the event of separation, divorce, or death as follows: "The parties' respective separate property rights of reimbursement shall be satisfied before the community balance is recognized and divided. *In the event the equity in the residence, i.e., the then current value less the then current loan balance, is insufficient to fully reimburse the parties' respective separate*

[1] The facts in this paragraph are recited in the agreement.

property contributions to its acquisition, the deficiency shall be shared equally between the parties." (Italics added.) The dispute before the court concerns the proper interpretation of italicized portion of this provision, paragraph 31 of the agreement.

At the time they bought the Derby house, Melani and Swenson intended to sell their separate homes and use the proceeds to make equal contributions to buy the Derby house. Melani sold her home in August 2006, and she used the proceeds of the sale to pay off the line of credit on Swenson's Danville house. They agreed that once the Danville house was sold, Swenson would pay Melani $500,000. Because the real estate market was unfavorable, however, Swenson took the Danville house off the market.[2]

Melani filed for divorce in 2011. The value of the Derby house had declined, and the equity in the house was insufficient to repay the parties for the contributions they had made to its acquisition and improvement.[3]

The issue of the validity and interpretation of the agreement was bifurcated from the other issues. The question before the court centered on the meaning of paragraph 31 of the agreement, which provided that if the equity was insufficient to reimburse the parties' separate property contributions, "the deficiency shall be shared equally between the parties." Melani took the position that the parties' right to reimbursement was not limited to the equity in the property. Because the equity was not sufficient to reimburse her for the approximately $1,000,000 she had put into the house, she contended, she was entitled to reimbursement for half the deficiency from other portions of the community property or Swenson's separate property. Swenson contended that the right to reimbursement was limited to the equity in the Derby house and could not be satisfied from either his separate property or other community property; accordingly, to the extent

[2] The facts in this paragraph are found in the parties' pleadings below, and are not disputed.

[3] Melani valued the deficiency, that is, the difference between the total contributions and the equity, at $522,771. The precise amount does not affect the resolution of the issues before us on appeal.

the equity was insufficient to satisfy Melani's separate property contribution, she would receive no reimbursement.

The family court agreed with Swenson. In an "Unreported Decision," the court first concluded that paragraph 31 was ambiguous with respect to this issue; that is, "[e]ither's party's interpretation is within the range of reasonable meanings that the parties *could have* intended the express language to read, without unacceptable violence to the language used." The court noted that the parties had been allowed to submit an offer of proof as to what parol evidence would show, but concluded that neither party had proffered useful parol evidence.[4] The court reasoned: "Here, both parties had reimbursement claims, of unequal size. It was therefore prudent for them to provide for what happens if the equity can pay those claims only partially, as is now the case (and was the case at the time of the [agreement]). There were any number of possible answers to this question, such as one or the other claim being paid first; division of the available equity proportional to the claims; proportional loss of the shortfall; equal loss of the shortfall; and so on. Answering this question is the purpose of Paragraph 31. It provides that the parties will share equally in the shortfall, to the extent of their respective claims. Since [Swenson's] claim is much smaller, that effectively means the parties will equally divide the first $100,000 of the shortfall. Thus, if the shortfall is equal to or greater than

[4] The court explained that Melani's declaration "contains only two items of what might be considered pertinent parol evidence, beyond undisputed and general background information. First, she asserts (and [Swenson] does not deny) that in 2006, when the parties bought the Derby property, [Swenson] made an oral promise to pay [Melani] $500,000 from the proceeds of his contemplated sale of his separate residence ([Danville]). But the [agreement] was made in 2008, and was intended to deal directly with the fact that by then [Swenson] had decided to hold the [Danville] property instead. [Melani] acknowledges that [Swenson] is not under any obligation to pay her the $500,000 at this point. And second, she points out . . . that the substance of Paragraph 31 was found in every draft of the [agreement]. That is of potential significance in a negative sense, in that it means there is no [drafting history] from which we may infer what the parties were saying and thinking. It provides no affirmative guidance, however, on what the Paragraph was intended to mean throughout all those drafts." (Fn. omitted.) Noting that Swenson had not proffered any parol evidence, the family court concluded there was no need for an evidentiary hearing.

$100,000 [Swenson] loses his entire reimbursement claim, while [Melani] loses that portion that exceeds the available equity. [¶] I conclude that this is the more plausible reading of Paragraph 31."

A different judge presided over trial of the remaining issues. In the judgment on the reserved issues, the family court adopted the Unreported Decision and awarded the Derby house to Melani as her sole property.

II. DISCUSSION

Melani contends the family court's interpretation of paragraph 31 of the agreement contradicts both its plain meaning and the intent of the parties as shown by extrinsic evidence.

We review the trial court's interpretation of a written instrument de novo unless conflicting extrinsic evidence raises an issue of fact or credibility. (*In re Marriage of Kelkar* (2014) 229 Cal.App.4th 833, 845; *Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 57 ["Unless resolution depends on the credibility of conflicting extrinsic evidence, the interpretation of a writing involves a question of law for de novo review by the appellate court"].) " 'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id*., § 1639.) The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" (*id*., § 1644), controls judicial interpretation. (*Id*., § 1638.)' " (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.)

For its interpretation of paragraph 31, the family court relied in part on Family Code,[5] section 2640, which provides that in dividing community property, unless a party has waived the right to reimbursement, "the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source. The amount

[5] All undesignated statutory references are to the Family Code.

reimbursed . . . may not exceed the net value of the property at the time of the division." (§ 2640, subd. (b).) The court reasoned: "[Paragraph 31] is one part of a much longer set of provisions concerning the parties' respective rights as to the Derby property. It addresses 'separate property rights of reimbursement,' a familiar concept in family law. Family Code § 2640 provides that when one spouse has a reimbursement claim with respect to a community asset, the reimbursement claim is paid first, before the remaining community property interest is divided up. Paragraph 31 tracks that concept exactly. But under § 2640 the reimbursement claim 'may not exceed the net value of the property at the time of the division.' Thus, a reimbursement claim operates only as a claim against the available equity, not as a claim requiring affirmative payment from any other source. If the property has no equity, the reimbursement claim goes unpaid. If the equity is less than the reimbursement claim, the reimbursement claim is paid only to the extent of the equity." The court acknowledged that "the point of the [agreement] was to dictate a different result" than would have been the case in the absence of the agreement, but continued, "But the background law—and especially the terminology it uses—are strongly informative as to what the parties meant by the language they borrowed from the background law."

Melani challenges this interpretation. She points out that paragraph 33 of the agreement provided, in part, "The provisions of this subsection are . . . intended to and do in fact change the ordinary operation of Family Code sections 2581 and 2640 and related statutes, cases, and legal principles, which changes include an alteration in the manner that separate property reimbursement is calculated and each party's entitlement to receive such reimbursement in the event of death." Accordingly, she argues, the family court erred in using section 2640 to aid in interpreting the agreement.

Melani also contends the family court erred in declining to consider extrinsic evidence of a number of things: that she and Swenson planned to sell Swenson's Danville house and use the sale proceeds to equalize their investments in the Derby house; that Melani invested more in the Derby house than Swenson; that Swenson took the Danville house off the market because the housing market was unfavorable; that their

joint estate planner recommended to Melani that she seek independent counsel; that the parties remodeled the Derby house while they were negotiating the terms of the agreement; that Melani invested all of the proceeds in the sale of her former house in remodeling the Derby house; that the parties agreed to share the risk of a decrease in the value of the Derby house until the Danville house was sold; that she would not have sold her former house if Swenson had not agreed to sell the Danville house and invest equally in the Derby house; and that she would not have given up her statutory reimbursement rights if Swenson had not agreed to share any deficiency equally.

The contractual language and the undisputed circumstances under which the agreement was executed persuade us that Melani's interpretation of the agreement is correct. Melani sold her house and spent a million dollars of her own money buying and remodeling the Derby house and repaying Swenson's line of credit. Swenson's contribution was far less, only $50,000. He acknowledged in a settlement conference statement, and has made no attempt to deny, that at the time Melani used her separate property to pay down the mortgage on the Derby house and pay off the line of credit on Swenson's Danville house, the couple agreed that he would pay her $500,000 when he sold the Danville house. In light of these facts, the most reasonable interpretation of paragraph 31 is that it was intended to equalize the financial risk to Melani inherent in the gross disparity of the parties' respective contributions, until such time as Swenson sold his own house and invested equally in the Derby house. Indeed, it appears likely that paragraph 31 was intended to serve as an incentive for Swenson to do as the parties had agreed and thus share equally in the benefits as well as the risks of changes in the housing market.

We recognize that Melani was awarded the entire equity in the house as her separate property, while Swenson retained his own separate property house. But this does not equalize their positions. The Derby house was subject to a significant mortgage, while at least as of the time of the agreement, Swenson owned his house (which was worth $850,000 at the time of the agreement) free of any mortgage. Part of the reason Swenson owed nothing on the house was that Melani had given him $250,000 of her

separate property to pay off the line of credit he had used to acquire the couple's Derby house. Under Swenson's interpretation of the agreement, Melani gave up any right to reimbursement for that $250,000, while agreeing to assume almost the entire risk of a deficiency in the Derby house if Swenson chose not to sell his Danville residence. (See § 2640, subd. (c).) Nothing in the record suggests the parties intended this improbable result.[6]

Although the trial court considered the agreement to be ambiguous and therefore it could look to extrinsic evidence to interpret it, the court apparently concluded that the context in which the parties entered into the agreement was unhelpful in understanding paragraph 31. As we have explained, however, we find the surrounding circumstances and the mutual understanding of the parties highly relevant. In our view, that context explains the parties' reasonable expectations at the time of the agreement.

We also agree with Melani that it is not appropriate to rely on section 2640 to interpret the agreement. As we have noted, the agreement recites that it alters the parties' rights under section 2640. In light of the undisputed factual background, particularly Melani's action in giving Swenson $250,000 and the mutual understanding of the parties that Swenson would equalize the parties' contributions to the Derby house, we cannot conclude that the parties intended the limitations of section 2640 to govern Melani's reimbursement claim.

III. DISPOSITION

The judgment is reversed to the extent it denies Melani's claim for reimbursement of her separate property contributions to the Derby house. The matter is remanded to the family court for further proceedings consistent with this opinion.

[6] Indeed, Swenson offered no evidence that he intended such a result. In his settlement conference declaration, he averred that he knew nothing of the depreciation clause until after Melani filed for divorce.

_____
Rivera, J.

We concur:

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Reardon, Acting P.J.

_____
Streeter, J.